NO. 80-5856

RECEIVED
JAN 14 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DANIEL JOSEPH BAKER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

NICHOLAS G. DUMICH
Assistant Attorney General
Counsel of Record for
the Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

NICHOLAS G. DUMICH
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-6344

QUESTIONS PRESENTED

1.

Whether the Supreme Court of Georgia employed the proper procedures on remand from this Court and properly reaffirmed Petitioner's death sentence in light of Godfrey v. Georgia, 446 U.S. ___, 100 S.Ct. 1759 (1980), and Gregg v. Georgia, 428 U.S. 153 (1976).

2.

Whether this Court should consider the question of the trial court's failure to define and explain the terminology expressed in Ga. Code Ann. § 27-2534.1(b)(7), when said issue was not addressed in the lower state courts.

3.

Assuming arguendo this issue is properly before the Court in light of number 2 above, whether or not it was necessary for the trial court to give limiting and explanatory instructions during the punishment phase of Petitioner's trial in regard to Ga. Code Ann. § 27-2534.1(b)(7).

4.

Whether or not the existence of an additional aggravating circumstance would permit Petitioner's death penalty to remain intact, should this Court find that one of the aggravating circumstances has been improperly imposed.

TABLE OF CONTENTS

Page

PART ONE
STATEMENT OF THE CASE 1

PART TWO
STATEMENT OF THE FACTS. 2

PART THREE
REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY REAFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. § 27-2534.1(b)(7), IN LIGHT OF GODFREY V. GEORGIA, 446 U.S. ___, 100 S.Ct. 1759 (1980) AND GREGG V. GEORGIA, 428 U.S. 153 (1976) 5

B. PETITIONER DID NOT SPECIFICALLY RAISE IN THE STATE COURTS BELOW, THE QUESTION OF WHETHER THE TRIAL COURT ERRED IN FAILING TO DEFINE AND EXPLAIN THE TERMINOLOGY EXPRESSED IN GA. CODE ANN. § 27-2534.1(b)(7), AND SAID QUESTION SHOULD NOT NOW BE EXAMINED FOR THE FIRST TIME ON THIS PETITION FOR A WRIT OF CERTIORARI. ALTERNATIVELY, THE FAILURE OF THE TRIAL COURT TO EXPLAIN SAID TERMINOLOGY WAS NOT ERROR, AND DID NOT OPERATE TO DEPRIVE THE PETITIONER OF ANY STATUTORY OR CONSTITUTIONAL RIGHTS 9

C. IN ADDITION TO FINDING AN AGGRAVATING CIRCUMSTANCE UNDER GA. CODE ANN. § 27-2534.1 (b)(7), THE JURY ALSO FOUND SUFFICIENT EVIDENCE TO INDEPENDENTLY SUPPORT PETITIONER'S DEATH PENALTY UNDER GA. CODE ANN. § 27-2534.1 (b)(2) 13

CONCLUSION. 16

CERTIFICATE OF SERVICE. 17

TABLE OF AUTHORITIES

Cases Cited:	Page
Baker v. Georgia, ___ U.S. ___, 100 S.Ct. 2936 (1980). . .	1
Baker v. State, 243 Ga. 710, 711, 257 S.E.2d 192 (1979, death sentence vacated and remanded, ___ U.S. ___, 100 S.Ct. 2936 (1980), reaffirmed, 246 Ga. 259, ___ S.E.2d ___ (1980)	1,13
Baker v. State, 246 Ga. 259, ___ S.E.2d ___ (1980)	1
Burger v. State, 245 Ga. 485, 460-61, 265 S.E.2d 797, cert. den., ___ U.S. ___, 100 S.Ct. 2975, rehng. den., ___ U.S. ___, 101 S.Ct. 31 (1980)	14
Cape v. State, 246 Ga. 520, ___ S.E.2d ___ (1980).	8
Cardinale v. Louisiana, 394 U.S. 437 (1969).	10
Dampier v. State, 245 Ga. 882, 883, ___ S.E.2d ___, cert. den., ___ U.S. ___ (Case No. 80-5215, 1980)	14
Davis v. State, 241 Ga. 376, 384, 247 S.E.2d 45 (1978), cert. den., 429 U.S. 122 (1978)	13
Fair v. State, 245 Ga. 868, 880, ___ S.E.2d ___ (1980), cert. den., ___ U.S. ___ (Case No. 79-6884, Nov. 10, 1980)	14
Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), cert. den., ___ U.S. ___, 100 S.Ct. 1332 (1980) . . .	14
Godfrey v. Georgia, 446 U.S. ___, 100 S.Ct. 1759 (1980). .	i,1,passim
Green v. State, 246 Ga. 598, ___ S.E.2d ___ (1980)	8
Gregg v. Georgia, 428 U.S. 153 (1976).	i,5,7,8
Hance v. State, 245 Ga. 856, 862, 268 S.E.2d 339 (1980). .	7,8,11
Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. den., 431 U.S. 933 (1977), rehng. den., 434 U.S. 883 (1977)	11
Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), cert. den., 439 U.S. 882 (1978)	13
Philbrook v. Glodgett, 421 U.S. 707, 713 (1975).	13
Tacon v. Arizona, 410 U.S. 431 (1973).	10
Westbrook v. Balkcom, ___ U.S. ___, 49 U.S.L.W. 3371 (Nov. 17, 1980), (Stevens, J., concurring).	14

Statutes Cited:	Page
28 U.S.C. § 1257	10
Ga. Code Ann. § 27-2534.1(b)(2).	10,13,15,16
Ga. Code Ann. § 27-2534.1(b)(7).	i,5,7,8,9, 10,12,13

PART ONE

STATEMENT OF THE CASE

Petitioner, Daniel Joseph Baker, was indicted along with co-defendant Ricky Lee Massey by the March Term, 1978, Gwinnett County, Georgia Grand Jury for the murder and armed robbery of Dennis Beatenbo. Following a jury trial in which Petitioner was separately tried from his co-defendant, Petitioner was found guilty on both counts and was sentenced to death for the murder conviction and to life imprisonment for the armed robbery.

On his first direct appeal to the Supreme Court of Georgia, Petitioner's convictions and sentences were affirmed. Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (1979). On May 27, 1980, certiorari was granted by this Court, the Georgia Supreme Court's affirmance of Petitioner's death penalty was vacated, and the case was remanded for further review by the Georgia Supreme Court in light of this Court's decision in Godfrey v. Georgia, 446 U.S. ___, 100 S.Ct. 1759 (1980). Baker v. Georgia, ___U.S.___, 100 S.Ct. 2936 (1980).

Upon remand, the Supreme Court of Georgia again reaffirmed Petitioner's death sentence. Baker v. State, Addendum, 246 Ga. 259, ___S.E.2d ___ (1980). Thereafter, Petitioner filed the instant petition for a writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

As noted in the previous section, Petitioner was indicted along with co-defendant Rick Massey for the May 5, 1978, murder and armed robbery of Dennis Beatenbo. The evidence shows that during the evening on the aforesaid date, Petitioner and a friend, Rick Massey, had been drinking while driving around the Norcross, Georgia community area. Seeing Dennis Beatenbo walking along the road, Massey and the Petitioner stopped and asked him if he needed a ride. (T. 149-150). In exchange for this ride Beatenbo offered Petitioner and Massey some liquor which was contained in a bottle in Beatenbo's automobile which was parked elsewhere. (T. 70, 150, 261). In a statement to the police, the Petitioner related that when Beatenbo left Massey's car to retrieve the liquor, Massey suggested that they "roll" him. (T. 150). Beatenbo returned and the three men then went for a drive while continuing to consume the liquor. Eventually they drove to an isolated spot at a nearby lake. (T. 150). Thereafter, Beatenbo began to feel nauseated. While Massey opened the back door so that Beatenbo could get out of the car, the Petitioner placed a newly purchased .25 caliber pistol in his belt. (T. 151).

In his confession to the police, Petitioner related that as Beatenbo was lying on the back seat with his head hanging over, Petitioner then smashed Beatenbo in the head with a liquor bottle, causing the bottle to break. Beatenbo then raised up and fell out of the other side of the car, lying with his back on the ground. (T. 151, 251). The Petitioner then took the

victim's wallet and watch while Massey observed. (T. 151). In Petitioner's own words, "I reached in my belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and pulled the trigger, I don't know how many times I shot him, but I could hear him moaning and trying to say something." (T. 151). The Petitioner and Massey then split the $22.00 found in the victim's wallet, and drove to Petitioner's trailer. (T.152). Beatenbo's body was discovered the next morning. (T. 78).

During the trial, the State M ical Examiner testified that the victim had suffered a crushing blow to his face which broke his nose and damaged his eye and facial tissues. He further testified that the victim had received four gunshot wounds, three of which were the result of the pistol being pressed firmly against the victim's body and fired directly into his chest. Maliciously, one bullet was also fired into the victim's scrotum area; however, Dr. Dove theorized that this shot was fired after the victim had died. (T. 97-102). Another State's witness, Bobby Barnes, testified that on Friday, May 5, 1978, the Petitioner had admitted that he killed a man in a robbery by hitting him in the face with a bottle, then s ting him. (T. 82-83). Barnes also testified that he had seen the Petitioner with a gun at the Petitioner's trailer. (T. 84). After Petitioner's arrest, he informed the police where to find the pistol which was used in the murder, and Massey led the police to Beatenbo's watch which had been thrown away. (T. 132, 162). During the course of Petitioner's questioning by the police, he stated that Massey had never suggested killing Beatenbo, but suggested only that they rob him. It was solely Baker's idea to kill the victim, and when

asked why he had done it he answered, "Just to watch him die." (T. 158, 168).

Petitioner was convicted of the murder and following the punishment phase of the trial, the jury found that the death penalty was justified based on two aggravating circumstances, those being: (1) the murder was committed while the Petitioner was engaged in the armed robbery of the victim; and (2) the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the Petitioner. (T. 309-310).

Additional facts may be recited in the following portion of this Brief when necessary to more fully explain Respondent's argument.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY REAFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. § 27-2534.1(b)(7), IN LIGHT OF GODFREY V. GEORGIA, 446 U.S. ___, 100 S.Ct. 1759 (1980) AND GREGG V. GEORGIA, 428 U.S. 153 (1976).

Petitioner asserts that this Court should grant certiorari to consider whether the Georgia Supreme Court construed or applied Ga. Code Ann. § 27-2534.1(b)(7) in an unconstitutional manner. He attempts to discredit the opinion of the Georgia Supreme Court on remand, by asserting that the Court merely found insignificant factual differences which allegedly failed to distinguish this case from the facts in Godfrey v. Georgia, 446 U.S. ___, 100 S.Ct. 1759 (1980). Petitioner further argues that under the facts and circumstances of this case, the evidence was insufficient to support the jury's finding of a (b)(7) aggravating circumstance, or the Georgia Supreme Court's affirmation and reaffirmation of same.

Godfrey v. Georgia, supra, specifically dealt with the application of Ga. Code Ann. § 27-2534.1(b)(7) in that case. The jury in Godfrey recommended a death sentence based upon a partial finding under (b)(7) that the murder of the victim had been "outrageously or wantonly vile, horrible and inhuman." This Court held that there was nothing in these few words, standing alone, that implied any inherent restraint upon the arbitrary and capricious infliction of the death sentence. Godfrey, Id., at p. 1765.

In the instant case, however, relating to the (b)(7) aggravating circumstance, the jury found that the murder was, "outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." As opposed to Godfrey, the wording of the jury's finding in this case is sufficiently definite to insure against any arbitrary or capricious infliction of the death sentence, and the record as reviewed by the Georgia Supreme Court, revealed sufficient evidence to support the jury's finding that the victim suffered from torture,and that the Petitioner had demonstrated his depravity of mind beyond all reasonable doubt.

In the Appellant's confession to the police he related how he had smashed a whiskey bottle over the head of Dennis Beatenbo. He further admitted to the police, "I reached in my belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and I pulled the trigger. I don't know how many times I shot him, but I could hear him moaning and trying to say something. . ." (T. 151).

The testimony at trial established that the victim had suffered a crushing blow to the face which had broken his nose and had extensively damaged the tissue around both eyes. There was also a bruise on the victim's forearm which was classified by the medical examiner as a defensive type wound. (T. 102). Furthermore, Dr. Dove testified that the victim had suffered three separate chest wounds from a gun which had been placed directly against his body and fired. (T. 97). An additional fourth shot was fired into the victim's scrotum area; however, Dr. Dove theorized that this wound was implemented after the victim's death. (T. 98). The aforesaid amply supports the

jury's finding of torture which was notably absent in Godfrey.

Likewise, a finding that the Petitioner exhibited a depravity of mind which would authorize the death penalty in this case, is also demonstrated by the evidence. The facts, as noted under Part Two of this Brief, show a cold-blooded, brutal attack upon the victim and no remorse on the part of the Petitioner. The jury's finding that the Petitioner exhibited depravity of mind can best be supported simply by a review of those facts, and by referring to the statement made by the Petitioner when asked, "Danny why did you kill him?" The Petitioner answered, "Just to watch him die." (T. 168). The Petitioner's mutilation of the body of Dennis Beatenbo after killing him, is also sufficient to show Petitioner's depravity of mind within the meaning of the statute. Hance v. State, 245 Ga. 856, 862, 268 S.E.2d 339 (1980).

In Gregg v. Georgia, 428 U.S. 153, 201 (1976), the plurality opinion addressed the issue of whether Ga. Code Ann. § 27-2534.1 (b)(7) was overly broad and vague. This Court acknowledged that an open-ended construction need not be applied by the Georgia Supreme Court to the language of the statute, and thus, the constitutional validity of that Code Section was upheld. Here, the Georgia Supreme Court engaged in a detailed examination of the facts in this case as applied to the (b)(7) aggravating circumstance found by the jury. In reality, since this court's decision in Godfrey, the Supreme Court of Georgia has taken even greater pains to make its appellate review an elaborate and detailed process to insure against the imposition of a disproportionate or arbitrary death penalty. See, e.g.,

Hance v. State, supra; Cape v. State, 246 Ga. 520, ___S.E.2d ___ (1980); Green v. State, 246 Ga. 598, ___S.E.2d ___ (1980). Thus, the Georgia Supreme Court has met the mandates as set out by this Court in Gregg, supra and Godfrey, supra.

Furthermore, contrary to Petitioner's assertions, there was no requirement that the Georgia Supreme Court allow Petitioner to file briefs or conduct oral argument prior to said court's review of this case following remand from this Court on May 27, 1980. Upon remand, the Georgia Supreme Court merely conducted a portion of its previous appellate review in more detail. The Court did not conduct any sentencing proceeding, but merely reconsidered its own judgment in light of Godfrey. The Georgia Supreme Court, at that time, had before it the complete record of Petitioner's trial, which included all of the information necessary to review the jury's findings on Ga. Code Ann. § 27-2534.1(b)(7). The decision as to whether or not to allow oral argument and additional briefing was within the sound discretion of the Georgia Supreme Court and does not rise to a constitutional violation under the facts of this case.

B. PETITIONER DID NOT SPECIFICALLY RAISE IN THE STATE COURTS BELOW, THE QUESTION OF WHETHER THE TRIAL COURT ERRED IN FAILING TO DEFINE AND EXPLAIN THE TERMINOLOGY EXPRESSED IN GA. CODE ANN. § 27-2534.1(b)(7), AND SAID QUESTION SHOULD NOT NOW BE EXAMINED FOR THE FIRST TIME ON THIS PETITION FOR A WRIT OF CERTIORARI. ALTERNATIVELY, THE FAILURE OF THE TRIAL COURT TO EXPLAIN SAID TERMINOLOGY WAS NOT ERROR, AND DID NOT OPERATE TO DEPRIVE THE PETITIONER OF ANY STATUTORY OR CONSTITUTIONAL RIGHTS.

An additional issue raised by the Petitioner in the present case pertained to whether or not Petitioner's death penalty, as authorized under Ga. Code Ann. § 27-2534.1(b)(7) must be vacated, because of the failure of the trial judge to instruct the jury relating to the legal meaning and definition of the terminology under said statute.

Initially, it should be noted that this issue was neither specifically raised nor considered in Petitioner's direct appeal to the Georgia Supreme Court or upon remand following Petitioner's initial application for certiorari. Since said issue was not specifically raised before the Georgia Supreme Court, Respondent respectfully submits that this Court should decline to review this issue for the first time on this writ of certiorari.

The Petitioner's enumerations of error in the Georgia Supreme Court raise three issues:

(1) Whether the jury could have properly found an aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(2) [i.e., the murder was committed while in the commission of another capital felony: to wit, armed robbery] when under Georgia law, the death penalty may no longer be imposed for armed robbery alone?

(2) Whether the term "depravity of mind" is unconstitutionally vague as used in Ga. Code Ann. § 27-2534.1(b)(7)?

(3) Whether or not the jury was authorized to impose the death penalty under Ga. Code Ann. § 27-2534.1(b)(7) when allegedly there was no evidence to support a finding of torture?

This Court has consistently ruled that federal constitutional issues raised for the first time on appeal from a state court decision will not be reviewed. Cardinale v. Louisiana, 394 U.S. 437 (1969); Tacon v. Arizona, 410 U.S. 531 (1973); also see, 28 U.S.C. § 1257. Thus, since the federal question raised relating to the trial court's instructions under (b)(7) has not been reviewed, preserved or specifically passed upon in the state courts below, this Court should decline to accept jurisdiction to review this issue.

Alternatively, Respondent submits that justification for this Court's refusal to grant the writ of certiorari to review Petitioner's above contention may rest upon this Court's finding that the absence of any explanatory or limiting instructions was not error and did not harm the Petitioner under the facts of the instant case.

This is evidenced by the jury's (b)(7) finding that the murder in the instant case was "outrageously vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." (T. 309). In Godfrey, as this Court is well aware, the jury returned only a finding that the murder was outrageously or wantonly vile, horrible and inhuman. Thus, this Court was forced to speculate as to the jury's interpretation of aggravating circumstance (b)(7). Unlike Godfrey, the finding by the jury in this case of torture and depravity of mind leaves no doubt as to the jury's interpretation under the first clause of (b)(7).

Notwithstanding the trial court's failure to expound on the terminology of (b)(7), Petitioner's right to be free from an arbitrary and capricious decision under that Code Section was protected through the appellate review by the Georgia Supreme Court both on the original direct appeal and upon remand from this Court. At the time Petitioner's trial was reviewed on remand by the Georgia Supreme Court, said court had already before it the benefit of this Court's opinion in Godfrey, and had also decided Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), where the Georgia Court engaged in a detailed, thorough discussion of (b)(7) in light of Godfrey. Even prior to Hance, the Georgia Supreme Court had recognized its obligation to insure that it only affirmed those death sentences supported by Code § (b)(7), which are so outrageous and vile so as to lie at the core of the statutory intent. See, Harris v. State, 237 Ga. 718, 730, 230 S.E.2d 1 (1976), cert. den., 431 U.S. 933 (1977), rehng. den., 434 U.S. 882 (1977). Here, since the jury made a sufficiently specific finding regarding the (b)(7) aggravating circumstance, and since the Georgia Supreme

Court adequately performed a thorough review under the facts of this case to insure said findings were thoroughly supported by the record, this Court can determine that the absence of limiting or explanatory instructions relating to the meaning of the individual terms contained in aggravating circumstance (b)(7) did not disadvantage the Petitioner or deprive him of any constitutional or statutory rights.

Moreover, there is no statutory provision under Georgia law which requires that the specific terminology under (b)(7) be explained. The judge in this case did instruct the jury that the death penalty could be imposed if the jury found beyond a reasonable doubt that the offense was committed under statutory aggravating circumstances. (T. 303). The court directed that one of the statutory aggravating circumstances which could authorize the death penalty in this case, was the jury's finding, "that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant." (T. 304). The court also instructed that even though statutory aggravating circumstances were found, the jury need not recommend the death penalty, and could recommend a life sentence for any reason, or without any reason. (T. 306). In light of the aforesaid instructions to the jury, and in light of the detailed review by the Georgia Supreme Court which insured said instructions were not applied arbitrarily or capriciously to the facts of this case, it is clear Petitioner has not been harmed by the absence of an explanation to the jury of the individual meaning of the terms in Code § 27-2534.1(b)(7).

C. IN ADDITION TO FINDING AN AGGRAVATING CIRCUMSTANCE UNDER GA. CODE ANN. § 27-2534.1 (b)(7), THE JURY ALSO FOUND SUFFICIENT EVIDENCE TO INDEPENDENTLY SUPPORT PETITIONER'S DEATH PENALTY UNDER GA. CODE ANN. § 27-2534.1 (b)(2).

As noted in Part Two of this Brief, two statutory aggravating circumstances were found to exist by the jury which tried the Petitioner's case. In addition to finding that the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant, the jury also found that the murder was committed while the Petitioner had been engaged in the commission of an armed robbery. (T. 309-310; R. 12). The Georgia Supreme Court has consistently held that under Georgia law armed robbery is a capital felony for the purpose of finding aggravating circumstances under Ga. Code Ann. § 27-2534.1(b)(2). Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), cert. den., 439 U.S. 882 (1978); Davis v. State, 241 Ga. 376, 384, 247 S.E.2d 45 (1978), cert. den., 429 U.S. 122 (1978); Baker v. State, 243 Ga. 710, 711, 257 S.E.2d 192 (1979), death sentence vacated and remanded, ___U.S.___, 100 S.Ct. 2936 (1980), reaffirmed, 246 Ga. 259, ___S.E.2d ___ (1980). In holding that armed robbery may be considered a capital felony for the purpose of Code § 27-2534.1(b)(2), the Georgia Supreme Court has correctly applied the basic premise that the objective of a court in construing statutory construction is to ascertain the intent of the legislature and to give effect to that legislative will. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975).

The law in Georgia is also clear that even if the finding of one of the aggravating circumstances must be set aside, the death penalty will still be upheld if another aggravating circumstance exists. Dampier v. State, addendum, 245 Ga. 882, 883, ___S.E.2d___, cert. den., ___U.S.___ (Case No. 80-5215, 1980); Fair v. State, 245 Ga. 868, 880, ___S.E.2d ___ (1980), cert. den., ___U.S.___ (Case No. 79-6884, Nov. 10, 1980); Burger v. State, 245 Ga. 485, 460-61, 265 S.E.2d 797, cert. den., ___U.S.___, 100 S.Ct. 2975, rehng. den., ___U.S. ___, 101 S.Ct. 31 (1980); Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979), cert. den., ___U.S.___, 100 S.Ct. 1332 (1980).

Furthermore, in denying certiorari in an additional Georgia death penalty case, Justice Stevens noted:

> "The Georgia Supreme Court . . . decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of the aggravating circumstances is vunerable. . .. The Georgia Supreme Court's position is clear, and . . . I consider it consistent with this Court's decisions." Westbrook v. Balkcom, ___U.S. ___, 49 U.S.L.W. 3371 (Nov. 17, 1980), (Stevens, J., concurring).

Respondent submits that the remands which have been issued by this Court do not indicate that a complete reversal of the death sentence is required when one aggravating circumstance is found not to be supported by the evidence. Contrary to Petitioner's assertions, there is no ambiguity as to whether the basis for the death penalty is constitutional. The jury found that there was sufficient evidence to support both aggravating circumstances beyond a reasonable doubt. The elimination of one of the aggravating circumstances on appeal had no effect on the evidence considered by the jury in this case, as the jury is authorized to consider all facts and circumstances presented at trial in mitigation and aggravation. The underlying facts and circumstances which formulated the basis for the death penalty were available for the jury's consideration notwithstanding any later appellate decisions vacating one of the statutory aggravating circumstances. Thus, assuming arguendo that this Court should find the (b)(7) aggravating circumstance to be unconstitutionally imposed in this case, that would simply have no bearing on the jury's imposition of the death penalty under Code § 27-2534.1(b)(2), because the jury still would have had all of the same underlying information before it in aggravation and to further support their (b)(2) finding beyond the statutory requirements for that circumstance.

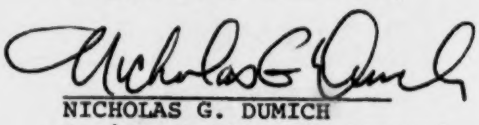
Here, there was overwhelming evidence that the attack upon the victim had been motivated by an intent to "roll him," and that $22.00 and a watch were taken from the victim's body after Petitioner smashed the victim in the face with a whiskey bottle, and immediately before killing him. (T. 150-151, 158). Thus, the Georgia Supreme Court properly affirmed the (b)(2) aggravating circumstance as being supported by the evidence.

In conclusion, Respondent asserts that even if the seventh aggravating circumstance was improperly found in the instant case, the existence of the additional aggravating circumstance under Code § 27-2534.1(b)(2) is sufficient to support the death penalty.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of Petitioner Danny Baker.

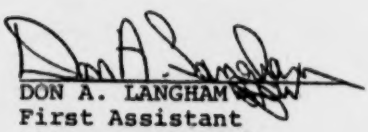
Respectfully submitted,



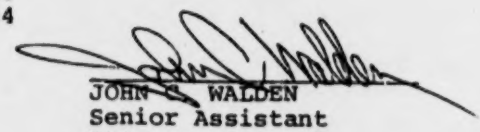
NICHOLAS G. DUMICH
Assistant Attorney General
Attorney of Record for the
Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General



DON A. LANGHAM
First Assistant
Attorney General



JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

NICHOLAS G. DUMICH
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3499